

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
MR. AND MRS. E. S. CARLSON, et al.)
Appellants,)
v.)
VALLEY READY MIX CONCRETE CO.,)
YAKIMA COUNTY CLEAN AIR AUTHORITY,)
DEPARTMENT OF NATURAL RESOURCES,)
DEPARTMENT OF ECOLOGY, DEPARTMENT)
OF FISHERIES AND DEPARTMENT OF)
GAME,)
Respondents.)

PCHB Nos. 1029 & 1029-B

ECPA No. 4

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

FINDINGS OF FACT

I.

Pursuant to WAC 173-08-030,⁸ final decisions were rendered by the
State Departments of Natural Resources, Ecology, Fisheries and Game,

8. DEFINITIONS. . . .

(4) "Permit" means . . .

Department of Natural Resources . . .

Surface mine reclamation permit

RCW 78.44.080. . . .

Regional Air Pollution Control Authorities

New source construction approval

RCW 70.94.152. . . .

. . . .

Department of Ecology

Surface water rights permit

RCW 90.03.250

Flood control zone permit

RCW 86.16.080. . . .

Department of Fisheries

Hydraulic project approval

RCW 75.20.100. . . .

. . . .

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1 and the Yakima County Clean Air Authority, responsive to the instant
2 ECPA master application filed on August 30, 1974.

3 II.

4 The Department of Natural Resources' final decision dated
5 April 16, 1976 granted a Surface Mining Permit No. 11298 subject
6 to the following conditions:

- 7 1. Undisturbed buffer strips with a minimum width of 100 feet
8 shall be maintained between surface mining areas and the
river and the adjacent property lines.
- 9 2. Slopes entering water shall not exceed 4:1 from existing grade
10 to 5 feet below low water level.
- 11 3. Adequate control measures shall be utilized to prevent dust
created by the project from blowing onto adjacent property.

12 III.

13 The Yakima County Clean Air Authority, by final decision dated
14 April 15, 1976, gave its New Source Construction Approval to the moving
15 of the applicant's existing crushing equipment from its present
16 Emerald Road pit to the proposed site. No expansion of capacity was
17 approved by the permit.

18 IV.

19 The Department of Ecology, by Order dated April 19, 1976 (based on
20 the Report, Findings of Fact and Decision dated April 16, 1976) granted
21 to the applicant a Flood Control Zone Permit subject to the following
22 conditions:

- 23 1. No dikes, levees, or other permanent structures or works shall
24 be located within the designated floodway;
- 25 2. Stockpiles, overburden disposal area, and plant site shall
be permanently located in the floodway fringe only;

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- 1 3. All petroleum storage facilities, electrical service
2 connections, and furnace fire pot(s) shall be located at
or above elevation 690 feet MSL (USGS Datum);
- 3 4. All permanent structures and semi-permanent equipment
4 (highline mast, conveyor system) shall be firmly anchored to
prevent dislocation by floodwaters.
- 5 5. Aggregate stockpiles shall be oriented such that their long
6 axes are parallel to the river/floodwater flow.
- 7 6. There will be preserved and maintained an undisturbed berm
8 (naturally existing ground) between the existing left (north)
bank of the Yakima River and the pit site of not less than 100
feet;
- 9 7. There will be preserved and maintained the west 400 feet of
10 Government Lot 1, Section 26, and that portion of the applicant's
property in Section 27, all within T. 10 N., R. 21 E.W.M.;
- 11 8. All debris generated from surface clearing will be disposed
12 of outside of the natural 100 year flood plain.
- 13 9. No excavation shall be permitted within fifty (50) feet of
14 the base of the Bonneville Power Administration transmission
towers. The slope of the remaining banks around the tower shall
15 be no greater than 2:1. Such slopes shall be protected by rock
riprap placed in conformance with standard design criteria,
attached hereto as Exhibit No. 3.

16 By Order dated April 19, 1976 the Department of Ecology issued a
17 Surface Water Permit of .667 cubic feet per second, 150 maximum acre-
18 feet per year to be used for non-consumptive aggregate washing
19 continuously. The permit is subject to the following provision:

20 . . . The entire opening of the diversion intake shall
21 be tightly screened at all times with wire mesh having
22 openings with dimensions not greater than 0.125 (1/8)
inch. Water approach velocity to the screen shall be
23 less than 1 foot per second and approaching 0.5 foot
per second, as measured one (1) foot in front of the
screen.

24 V.

25 By letter dated April 19, 1976 the Departments of Fisheries
-6 and Game denied issuance of their hydraulics project approval, stating

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1 therein:

2 . . .
3 If the stream and fish can be prevented from
4 entering the excavated site, and if the water
5 quality and quantity concerns can be solved
6 for the life of the operations and the life of
7 the open pit, we could approve the proposal. . . .

8 Valley Ready Mix's appeal of this final decision was filed as
9 PCHB No. 1029-A, ECPA 4.

10 On December 20, 1976, the Departments of Fisheries and Game
11 reversed their earlier denial of a hydraulic project approval and Valley
12 Ready Mix withdrew its appeal. On January 28, 1977, appellants E. S.
13 Carlson, et al. appealed the hydraulics project approval, such appeal
14 being filed as PCHB No. 1029-B, ECPA 4.

15 The hydraulics project approval granted is subject to general
16 provisions and the following special provisions:

- 17 1. This permit will be issued for a one-year period.
18 Renewal shall be on a year-to-year basis and will
19 be predicated upon the experience gained in any
20 given year of the permit in respect to flooding
21 and subsequent fish entrapment, fish egress from
22 area, time involved, mortality, etc.
- 23 2. Pit Excavation
 - 24 a) Each year's pit will be dug generally perpendicular
25 to backwater slough.
 - 26 b) Pit depth shall not exceed 20 feet deep as measured
27 from water surface of slough.
 - 28 c) Each year's pit excavation shall be in the form of
29 a rectangular strip not to exceed 150 feet wide.
 - 30 d) Each succeeding year's pit excavation shall be
31 conducted as identified in Provision (c).
 - 32 e) Pit discharge to slough shall be either in the form
33 of culverts or open excavation and shall have a minimum

1 water depth of 6 feet. All other discharge dimensions
2 will be determined after field investigation by
Departments.

3 3. Mode of operation - Pit excavations can take place year-
4 round with the following exceptions:

- 5 a) If when river surface waters enter the excavation
(floods, high water), all excavation shall cease.
- 6 b) Immediately when the high water has receded, the
7 Fisheries and Game Departments shall be notified.
- 8 c) Immediately when high water has receded, the discharge
of the pit into the slough will be opened (made operable).
- 9 d) Pit excavation will not begin again until written
10 approval is secured from our Departments and shall be
based upon the presence or absence of fish in the
11 excavation.
- 12 e) Departments may, at their option, have free access to
pit site area in order to evaluate fish entrapment,
egress, mortality, damage, etc.

3 4. Backwater slough shall be maintained from pit site to
14 Yakima River to the satisfaction of the Departments to
provide downstream fish egress by the sponsor at all times.

15 5. The river bankline shall be suitably protected to prevent
16 river entrance into the excavation area.

17 6. The sponsor of this project shall be responsible to
18 compensate for any fish loss occurring as a result of
this project. Such loss shall be determined by our
19 Departments.

20 7. If determined by the Departments of Fisheries and Game
that fish are being entrapped in the pit excavation and
21 are unable to egress safely to the river, our approval
would be void and re-validated only after the pit site
22 has been adequately flood-proofed by the applicant.

23 8. General Provision #8 shall be deleted.

24 VI.

25 A draft environmental impact statement for the proposed gravel pit
26 was circulated on October 23, 1974. The final EIS was prepared

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1 and distributed in February, 1976.

2 VII.

3 Any Conclusion of Law hereinafter stated which may be deemed
4 a Finding of Fact is hereby adopted as such.

5 From these Findings, the Board comes to these

6 CONCLUSIONS OF LAW

7 I.

8 For its standards of review, the Environmental Coordination
9 Procedures Act incorporates by reference the provisions of RCW 34.04-
10 .130(6):

11 The court may affirm the decision of the agency or
12 remand the case for further proceedings; or it may reverse
13 the decision if the substantial rights of the petitioners
may have been prejudiced because the administrative findings,
inferences, conclusions, or decisions are:

- 14 (a) in violation of constitutional provisions; or
- 15 (b) in excess of the statutory authority or jurisdiction
of the agency; or
- 16 (c) made upon unlawful procedure, or
- 17 (d) affected by other error of law; or
- 18 (e) clearly erroneous in view of the entire record as
submitted and the public policy contained in the
act of the legislature authorizing the decision or
order; or
- 19 (f) arbitrary or capricious.

20 The granting of the surface mining permit, new source construction
21 approval, flood control zone permit, surface water permit, and hydraulic
22 project approval by the respective state agencies did not violate
23 constitutional provisions, exceed statutory authority, or result from
24 unlawful procedure. Nor does the record support a conclusion that the
25 agencies acted arbitrarily or capriciously in approving the project as
conditioned.

26 To reverse the decisions of the state agencies therefore, the

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1 Pollution Control Hearings Board must find that their decisions were
2 "clearly erroneous" in view of the record established and the respective
3 authorizing statutes.

4 The clearly erroneous standard, as repeatedly stated by the
5 Washington Courts, requires that the reviewing court, herein the
6 Pollution Control Hearings Board, be left with the definite and firm
7 conviction that a mistake has been made, despite there being evidence
8 in the record to support the challenged administrative decision.

9 II.

10 Upon such review and consideration of applicable statutes, the
11 Pollution Control Hearings Board is not convinced that the state
12 agencies erred in issuing their respective permits and affirms the
13 final decisions rendered in this matter by the Departments of Natural
14 Resources, Ecology, Fisheries and Game and the Yakima County Clean Air
15 Authority.

16 III.

17 The Pollution Control Hearings Board has jurisdiction to review
18 allegations of violations of the SEPA when such violations may
19 invalidate a final decision rendered under the ECPA.

20 In reviewing such alleged violations, the Pollution Control
21 Hearings Board is subject to RCW 43.21C.090 which provides that with
22 regard to SEPA compliance, "the decision of the governmental agency
23 shall be accorded substantial weight".

24 Having accorded such weight to the decisions of the agencies at
25 issue, the Pollution Control Hearings Board concludes that the
26 environmental impact statement prepared for this proposal was

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1 adequate in quantity and quality to meet the needs of the respective
2 decision makers to inform themselves of the environmental impacts of the
3 proposed action.

4 IV.

5 The mitigative and specific nature of the conditions imposed under
6 the respective permits supports the Board's conclusions that environmental
7 impacts were assessed, that the decisions made were not arbitrary
8 and capricious and that the public policy of the respective authorizing
9 statute was considered and applied.

10 V.

11 The Pollution Control Hearings Board finds no reversible error of
12 law in the record below with regard to the procedural requirements
13 established by the Environmental Coordination Provisions Act, RCW 90.62
14 or in the Department of Ecology regulations promulgated pursuant
15 thereto, WAC 173-08.

16 VI.

17 Any Finding of Fact which should be deemed a Conclusion of Law
18 is hereby adopted as such.

19 From these Conclusions, the Pollution Control Hearings Board
20 enters this

21 ORDER

22 The final decisions of the Department of Ecology, Departments of
23 Fisheries and Game, Department of Natural Resources and the Yakima
24 County Clean Air Authority rendered responsive to the ECPA master
25 application filed by Valley Ready Mix Concrete Company are affirmed.

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1 DATED this 20th day of May, 1977.

2 POLLUTION CONTROL HEARINGS BOARD

3 W. A. Gissberg
4 W. A. GISSBERG, Chairman

5 Chris Smith
6 CHRIS SMITH, Member

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